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In The

Supreme Court of the United States

October Term, 1993

GRACE COMMUNITY CHURCH,

Petitioner,

vs.

TOWN OF BETHEL AND BETHEL PLANNING AND ZONING COMMISSION OF THE TOWN OF BETHEL,

Respondents.

On Petition For Writ Of Certiorari To The Appellate Court Of The State Of Connecticut

BRIEF OF THE RESPONDENTS IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner, GRACE COMMUNITY CHURCH, (hereinafter the Church) is an evangelical protestant congregation which owns a tract of land comprising 13.6 acres located at the intersection of Weed Road and Walnut Hill in the Town of Bethel, Connecticut. The zone in which the land is located is an R-40 residential zone. The Bethel Zoning Regulations for that zone allow a one-family residence on a plot of land containing a minimum of 40,000 square feet, with a minimum width of 140 feet. In addition, to specified permitted uses, mainly of a residential character, the Regulations allow several non-residential uses by Special Permit including a "Church, parish hall, and parish housing, including a convent or other similar residence for clergy." (Bethel Zoning Regulations §118-24B (2) lodged by Petitioner with clerk).

On July 10, 1990 the Petitioner submitted an application to the Bethel Planning and Zoning Commission (hereinafter the Commission) for a Special Permit to construct a Church and associated buildings on its property. The application was referred to several town officials and agencies for their comments. A public hearing was scheduled for August 14, 1990 which was subsequently continued to September 4, 11, and 18, 1990 due to the amount of public interest in the application.

On October 9, 1990 the Commission, at a regular meeting and after extensive discussion, by a 4 to 3 vote, denied the application.

From that decision, the Church brought an appeal to the Superior Court For the Judicial District of Danbury,

Connecticut *Grace Community Church v. Planning and Zoning Commission and the Town of Bethel,* et al. Docket #CV 90-0304616S (App. A). During the pendency of that appeal, the Church commenced this case against the same defendants seeking declaratory and injunctive relief and damages. The two matters were tried together before Judge Robert Fuller with the record in the first case being entered in its entirety as evidence in this case.

In addition, other testimony concerning the Church, its beliefs, activities and mission were offered into evidence. The Church claimed and the testimony revealed that the Church was a main line independent Protestant Evangelical Church. The Church began around 1981, and since 1985, has been attempting to locate a site and build a church to house its members during worship and a facility in which to carry on its various church related activities. The Church presently uses a high school in Brookfield, Connecticut, a town adjacent to Bethel, for its Sunday worship and other activities. The Church stated it would like to locate in Bethel because it believes it would be centrally located in the region from which it draws most of its members. About one-sixth of its members live in Bethel, more than that from neighboring Danbury, Connecticut, and the rest from the Danbury area The proposed location on Weed Road and Walnut Hill in Bethel is an old farm with no particular religious significance. The desire of the Church to build and have its own facility from the evidence presented, is no different from that of other churches desiring the same.

On March 17, 1992 Judge Fuller sustained the Church's appeal of its denial for a special permit and ordered the Appellant Commission to issue the Special

Permit for which the Church had applied (App. A). In rendering his decision, Judge Fuller pointed out that virtually the same application had been approved by the Commission in 1988, although that decision was reversed on appeal on procedural grounds (*Mark C. Hehl v. Bethel Planning and Zoning Commission* CV 88-0295893S). He found that absent a substantial change in circumstances, the Commission was bound to reapprove the application. Judge Fuller also found that the standard "that no condition will be created which will adversely affect traffic" which the Commission relied on in denying the Application, to be vague and an imprecise concept susceptible of several interpretations and, therefore, not a valid basis for denying the Special Permit. (App. A-21).

Subsequent to Judge Fuller's ruling, the Commission on April 14, 1992, issued to the Church the Special Permit for which it applied. No appeal was taken by either party from Judge Fuller's decision and no appeal was taken from the Commission's issuance of the permit. The Petitioner appealed the denial of its action for declaratory relief and damages to the Connecticut Appellate Court.

In rejecting their appeal, the Appellate Court found that the claim for injunctive and declaratory relief to be clearly moot, the Defendant Commission having issued the Plaintiff a special permit removing the basis for the need for relief. The Court concluded that it had no jurisdiction for injunctive and declaratory relief. (Petitioner Brief App. A-6).

In rejecting its claim for damages, the Court found that past Connecticut Supreme Court decisions, especially that of *St. John's Roman Catholic Corporation v. Darien*, 149 Conn. 712 (1962) supported the commission's position that the use of special permit procedures to regulate the location of churches in residential zones was a reasonable restriction and not violative of the Petitioner's right under the United States and Connecticut Constitutions.

In its petition, the Petitioner asserts that if it wishes to modify its building plans by adding, for example, a classroom, it must start over again in seeking a new special permit. (Petition For Writ of Certiorari P.5) Such a statement is misleading at best. The Church can never lose its Special Permit unless it fails to complete construction within the five years or extension thereof allowed by the Zoning Regulations. If the Church later wishes to expand its facilities, it would need only a modification of its Special Permit. While the procedures for obtaining the modification would be the same as for a new Special Permit, the Church would run no risk of losing the Special Permit it now holds.

ARGUMENT

1. THE PETITIONER'S CLAIMS FOR DECLARATORY AND INJUNCTIVE RELIEF ARE MOOT.

The Petitioner has obtained through its administrative appeal and the subsequent action of the Commission that which it requested, the granting of a special permit to build a church on the land it purchased for that very

reason. There is nothing more to be reasonably gained from further litigation.

The Trial Court and the Connecticut Appellate Court quite rightfully ruled that its claims for declaratory and injunctive relief were moot. There is no present controversy for which a Court should become involved. The Appellate Court very carefully considered this question and concluded that:

> "In this case, the Plaintiff's claim for injunctive and declaratory relief clearly is moot. The Commission, having issued the Plaintiff a special permit, the Plaintiff is free to build a church on its property in accordance with the approved plans. The Plaintiff, therefore, has no present need for relief that would limit the applicability of the allegedly unconstitutional regulations. The regulations no longer stand as an obstacle to the Plaintiff's existing plans to build a church. In light of the mootness doctrine, therefore, we have no jurisdiction to consider the Plaintiff's claim for injunctive and declaratory relief." Grace Community Church v. Bethel, 30 Conn. App. 765, 770 (1993). (Petitioner's App. A-6).

In its petition for a Writ of Certiorari, the Petitioner makes several attacks against Bethel's zoning regulations but nowhere does it address the question of the mootness of its claims. Even if the regulations as constituted were unconstitutional (a claim the Respondents vigorously deny) the Petitioner has what it applied for – a special permit to build a church at the location it selected.

Its attack on the zoning regulations and its claim of possible future infringement are not matters properly

before the Court and its petition should accordingly be denied.

2. THE PROVISIONS OF THE BETHEL ZONING REGULATIONS AS THEY AFFECTED THE PETITIONER WERE NOT VIOLATIVE OF THE PETITIONER'S RIGHT UNDER THE FREE EXERCISE, FREE ASSEMBLY OR FREEDOM OF ASSOCIATION PROVISIONS OF THE FIRST AMENDMENT.

In its petition for a writ of certiorari the Petitioner has launched a wholesale assault on the entire Bethel Zoning ordinance. Such an assault completely ignores the history of this case. The record shows that the only site ever seriously considered by the Church in Bethel was the site on Walnut Hill Road and Weed Road in a residential zone. During the course of the appeal from the Administrative Decision denying the special permit there was evidence that the church considered a site in a commercial area which was rejected because the price was too high. It was not until almost a year had elapsed after the commencement of the administrative appeal that the Petitioner commenced this present action seeking declaratory, injunctive and monetary relief.

Zoning cases do not exist in a vacuum. They exist within a certain factual situation. In this case the controversy actually revolved around the ability of the church to construct a church in a residential zone where the local zoning regulations required a special permit. The validity of a requirement of a special permit for churches to construct in residential zones has long been recognized in Connecticut. *St. John's Roman Catholic Church v. Darien*, 149 Conn. 712 (1956), *West Hartford Methodist Church v.*

Zoning Board of Appeals, 143 Conn. 263 (1956), *Barberino Realty and Development Corporation v. Planning and Zoning Commission*, 222 Conn. 607 (1992).

The Appellate Court in considering the Petitioner's claim for damages carefully considered the use of the special permit requirement. The Court found the regulations did not violate the Petitioner's First Amendment Rights and did not support an action for damages. This holding is consistent with past Supreme Court decisions in this area. There is nothing in the record of the present case which would warrant overruling that opinion.

The Petitioner has attempted to divert attention from the central issue of these cases, the location of its church on Walnut Hill Road and Weed Road, by attacking the Zoning ordinance in general. The Church is alleging that because a church also required a special permit to build in a commercial zone that this somehow impacted its ability to build on the site it selected in a residential zone on Walnut Hill Road. From there it wages a wholesale assault on Bethel's Zoning Regulations ignoring the fact that it never seriously considered any other site than the site for which it now has obtained a permit. In doing so it is attempting to avoid the requirement of having to receive a special permit should it ever wish to expand the limits of its church beyond the limits set forth in the special permit which it now holds. No Court should ever act based solely on the fears or apprehensions of the party applying for it. *Nicholson v. Connecticut Half-Way House, Inc.*, 153 Conn. 507, 511 (1966).

3. THE RULINGS OF THIS COURT CONCERNING LIVE NUDE DANCING HAVE NO RELEVANCE TO THE ISSUES OF THIS CASE.

The Petitioner in raising this issue in the context of this case have resorted to the use of a "red herring". It completely ignore the fact that a use such as live nude dancing is no where allowed in the residential zone in which it applied and ultimately received its permit to build a church. As previously pointed out in this Brief, in addition to residential uses the Bethel Zoning Regulations, allows *many* other uses by Special Permit including a Church[1]. None of those uses could remotely support a request for the type of live nude dancing mentioned in the Petitioner's brief. In fact in this case religious uses are permitted in the residential zones by Special Permit, but live nude dancing is not.

Whatever validity that may attach to Petitioner's comparisons between cases involving live nude dancing and the practice of religion are not applicable here. There is no basis for the implication that vice is protected in Bethel while the free exercise of religion is not. The crux of this case is that the Petitioner chose to locate its facility in a residential zone. As is common in most towns, that choice involved its receiving a Special Permit to build a non-residential use. As is common with many proposals for non-residential uses in a residential zone that choice created a certain amount of opposition based on fears of noise, congestion, traffic and lower property values. It

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[1] (A list of the 27 Special Permit uses allowed in a residential zone is set forth in §118-24 B of the Bethel Zoning Regulations, a copy is lodged with the clerk).

was not denied permission by the Commission by a 4 to 3 vote because of the content of its religion, but because of the adverse affect it would have on traffic. Ultimately, however, the church received what it asked for, permission to build its church.

The Petitioner's statement that *Schad v. Borough of Mt. Ephraim,* 452 U.S. 61 and *Playtime Theaters v. City of Renton,* 475 U.S. 41 stand for the proposition that live nude dancing and adult movie theaters cannot be zoned out of any community anywhere in the U.S. absent a strictly scrutinized compelling state interest while churches in many areas have no protection is absurd. In the *Schad* case the Court struck down a municipal prohibition against live nude dancing where the municipality took the position that no live entertainment was allowed in its commercial zone, a position that this Court stated was simply not supported by the record. In the *Renton* case this Court upheld a City Zoning regulation prohibiting "Adult Theaters" within 1000 feet of a church school or residential Zone even if located in a commercial zone. Churches far from being discriminated against, are allowed to be protected against intrusions from those seamier forms of "entertainment" that too often dot our towns and cities.

4. THE BETHEL ZONING REGULATIONS AS APPLIED TO THE PETITIONER DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Respondents vigorously contest that these questions can be properly raised within the context of this

case. It also asserts, however, that even if properly raised the Zoning Ordinance violates none of the Petitioner's protected rights. The Appellate Court clearly found that the Bethel Zoning Regulations were content neutral and met the standards set forth in *Hustsi v. Zuckerman Property Enterprise, LTD,* 199 Conn. 575, (1986).

> A content-neutral zoning regulation that restricts the permissible time, place and manner of protective speech is constitutional under the First Amendment if the regulation is designed to serve a substantial governmental issue and allows for reasonable alternative avenues of communication. Id., 581 quoting *Renton v. Playtime Theaters, Inc.*, 475 U.S 41, 50, 106 S.Ct., 925, 89 L.Ed.2d 29 (1986).

The Petitioner is contending in effect that it has an absolute right to build somewhere in Bethel and because that right is governed by the Special Permit process that the Zoning Ordinance is invalid. It ignores the fact that over 90% of the land in Bethel is zoned so as to allow the building of churches. *Supplemental Memorandum of Decision* (Petitioner's Brief App. C-6). The Petitioner relies upon certain uses being allowed in one of the commercial zones as a matter of right while churches require a special permit. They continue to ignore the fact that they voluntarily purchased property in a residential zone with the knowledge that they needed a special permit to build a church. Their argument is one of comparing apples to oranges.

The *Cleburne*[1], *Lamb's Chapel*[2], *Widmar*[3] and *Lukumi*[4] cases cited by the Petitioner as being in conflict with the holding in this case are not even applicable to this case. None of these cases dealt with the right of a town to require special permits for churches to locate in residential zones. In the Lukumi case, for example, the Court was faced with a City having enacted an ordinance specifically designed to prohibit the religious practice of the Church in question. There is no question but that the Bethel Zoning Regulations are one of general applicability and have been in effect for a substantial period of time prior to the Church's application.

The Petitioner's quote from *Christian Gospel Church, Inc. v. City and County of San Francisco*, 896 F.2d 1221 (9 Cir. 1990), cert. den. 498 U.S. 999, 111 S.Ct. 559, 112 L.Ed.2d 565 (1990). (Petitioner's Brief P. 13) regarding the dangers of local zoning authorities considering neighborhood opposition to applications for special permits from churches. The full quote from that case is as follows:

> "*Contrary to the arguments of the Church*, neighborhood opposition to the granting of a conditional use permit is not unlawful and should be considered by the Planning Commission." (emphasis ours)

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[1] *Cleburne v. Cleburne Living Center*, 473 U.S. 432, 87 L.Ed. 313, 105 S.Ct. 3249 (1985).

[2] *Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. (1993).

[3] *Widmar v. Vincent*, 454 U.S. 263 (1981).

[4] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, No. 91-948 June 11, 1993.

Christian Gospel Church, Inc. v. City and County of San Francisco, supra at 1225. The Petitioner seems to be advocating a position that churches have an absolute right to locate in residential zones and the residents have no rights to voice their opinion. How they justify the denial of the residents' rights of free speech under the First Amendment is missing from their brief.

5. THE BETHEL ZONING REGULATIONS REGARDING THE REQUIREMENT OF CHURCHES TO OBTAIN A SPECIAL PERMIT TO BUILD IN A RESIDENTIAL ZONE ARE NOT VIOLATIVE OF THE PETITIONER'S RIGHTS UNDER THE CONSTITUTION.

The Petitioner's arguments here are especially weak. It alleges that the provisions are patently and probably deliberately vague to give the Zoning Commission maximum power and discretion. It cites no evidence or authority to support its position. A review of the record in this matter will show that the Petitioner was never discriminated against on the basis of its religious views. Its application to build in a residential zone produced opposition based solely on perceptions that the Church would produce noise, traffic, congestion and lower property values. The Commission, even when it denied the Application, found that the Church had fulfilled two of the required three criteria set forth in §118.21 H of the Bethel Zoning Ordinances. Only on the basis of traffic was the Church denied a permit. It is clear that there was

no constitutional violations in either the zoning regulations or the way they were applied to the Church.

CONCLUSION

It is difficult for the Town of Bethel and its Planning and Zoning Commission to perceive why the Church is pursuing this appeal. It has received by virtue of the Commission's compliance with Judge Fuller's order in the Administrative Appeal exactly what it applied for. With respect to its building of a Church, there is no present controversy. Its attack on the zoning regulations began one year after it commenced its Administrative appeal of the denial for a special appeal.

This action raises issues that are in no way germane to its building a Church on the location it selected. It seems to rest its case on the fact that at the time it applied for its special permit, Churches also had to obtain special permits in some commercial zones where they were also permitted.

Its attack has been denied by the Connecticut Appellate Court and, in effect, by the Connecticut Supreme Court which refused to grant certification from the decision. It has nowhere put forth any reasons why this Court should disturb the underlying principle in this case that the location of churches in residential zones may be regulated by the use of Special Permit Regulations. These types of regulations have been upheld not only by the State of Connecticut, but by many other states including cases cited by the Petitioner in it's petition. It's petition

for a Writ of Certiorari to review the decision of the Connecticut Appellate Court should be denied.

Respectfully Submitted,

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APPENDIX

NO. 30 36 16

GRACE COMMUNITY CHURCH

V.

PLANNING & ZONING COMMISSION OF THE TOWN OF BETHEL, ET AL.

SUPERIOR COURT

JUDICIAL DISTRICT OF DANBURY

MARCH 17, 1992

MEMORANDUM OF DECISION

This is an appeal from the denial of a special permit to construct a church building in a residential zone, which questions, among other issues, whether municipal zoning laws can exclude churches as a permitted use anywhere in the municipality and whether denial of a special permit for a church violates the state and federal constitutions. The plaintiff has also raised these constitutional questions in a direct attack on the Bethel Zoning Regulations in a separate action for a declaratory judgment which was consolidated for trial with this appeal (Grace Community Church v. Town of Bethel, et al., CV 91-0306994S).

The plaintiff, Grace Community Church, is an ecclesiastical church corporation which is the owner of a parcel of about 13.6 acres on Walnut Hill Road in Bethel. The property is in a residential area and in the R-40 zone. Grace Community Church is a non-denominational church with approximately 500 members but no church building. It has been using Brookfield High School on

Sundays for religious services and related church activities. It previously obtained approval from the Commission on July 26, 1988 for a special permit and a related site plan for a church building on the 13.6 acre parcel. That approval was overturned on procedural grounds when abutting property owners brought a successful appeal to the Superior Court.

The plaintiff then submitted another application to the Commission for a special permit and site plan approval which was substantially similar to the prior application with a slightly smaller building. While the site has frontage on both Walnut Hill Road and Weed Road, the two proposed driveways for the site were both off Walnut Hill Road. The proposed church building contained about 19,000 square feet covering less than one-half acre of the site. The Commission approved the site plan on June 26, 1990. After the church filed the second special permit application on July 10, 1990, the Commission scheduled a public hearing on the application for August 14, 1990 and referred it to several town officials and agencies for their review. Their reports back to the Commission were favorable and any modifications or conditions which were suggested were either of no concern to the Commission, agreed to by the applicant or were not relevant to the grounds of the Commission's decision. There was an extensive public hearing on August 14, 1990, which was continued to September 4, 1990 and September 11, 1990. There was both support for and opposition to the application. Both sides had traffic experts who had prepared reports, discussed them, and answered questions. On October 9, 1990, the Commission extensively discussed the application and voted to deny it

based on Sec. 118-21H(3) of the Bethel Zoning Regulations, a general provision concerning traffic conditions. That was the only concern of the Commission as reflected in the minutes of its decision-making session, and the only reason assigned for denial of the application. The plaintiff appealed to this court within fifteen days after publication of the agency's decision as required by Sec. 8-8 of the General Statutes.

As the owner of the property which was the subject of the special permit application, the plaintiff is aggrieved by denial of its application. *Winchester Woods Associates v. Planning & Zoning Commission of Madison*, 219 Conn. 303, 308, ___A.2d___ (1991); *Bossert Corporation v. Norwalk*, 157 Conn. 279, 285, 253 A.2d 39 (1968).

This appeal raises both constitutional and nonconstitutional claims. Issues which were raised in the appeal but not briefed by the plaintiff, such as a claim that denial of the special permit is an unconstitutional taking of the property, are considered abandoned. *Shaw v. Planning Commission of Southbury*, 5 Conn. App. 520, 525, 500 A.2d 1338 (1985). Before constitutional claims can be considered, it must be determined whether the appeal can be sustained on a nonconstitutional issue. *Adolphson v. Zoning Board of Appeals of Fairfield*, 205 Conn. 703, 720, 535 A.2d 799 (1988); *Maloney v. Pac*, 183 Conn. 313, 324, 439 A.2d 349 (1981).

Most of the land in Bethel is in one of five single family residence zones. Permitted used in the single family residence zones include, among other uses, (1) one single family dwelling per lot; (2) certain types of home or professional offices and customary home occupations;

(3) community recreation facilities, not including an amusement park or privately owned facility; (4) farming, dairy, truck or nursery gardening; (5) a public library; (6) a public recreational facility operated by a governmental unit; (7) a family day care home. Section 118-24A of the Bethel Zoning Regulations. About thirty additional uses are allowed by a special permit in residential zones. Section 118-24B. They include the use applied for by the plaintiff, a "church, parish hall and parish housing, including a convent or other similar residence for clergy." Churches are allowed only with a special permit in all residential zones and some commercial zones, which comprise most of the land in the town. They are not a permitted use in any zone. Other uses allowed in residential zones by special permit include clubs, community center buildings, day care or nursery schools, fire stations, kennels, libraries or museums operated by nonprofit corporations, nursing or convalescent homes, police stations, post offices, private golf, tennis or swim clubs, schools, town highway facilities and town halls. Special permits require approval of a site plan which has numerous specific requirements. Sections 118-24C and 118-34B. Other requirements for special permit approval are contained in Sec. 118-21 which includes subsection H which provides:

> "Notwithstanding any other provision of this regulation, no special permit shall be approved unless the Planning & Zoning Commission shall have found that:
>
> (1) The proposed use will have no detrimental effect on present and future dwellings in the vicinity.

(2) The proposed architecture, site plan and landscaping are in harmony with the character of the neighborhood.

(3) No conditions will be created which will adversely affect traffic."

The Commission members agreed at their meeting on October 9, 1990 that the proposed church building and site plan complied with subsections (1) and (2), namely, that the proposed use did not have a detrimental effect on the neighbor hood, and the proposed design of the building and site were consistent with the character of the neighborhood. Their concern, and the reason for denial, was based on traffic conditions and interpretation of subsection (3) of the Regulations.

1. Test on review of special permits.

When a land use agency, such as a zoning commission, acts upon a special permit, it is required to give reasons for its action. Section 8-3c of the General Statutes. When reasons are given, the Superior Court on appeal determines whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the agency is required to apply under the zoning regulations. *DeMaria v. Planning & Zoning Commission of Enfield*, 159 Conn. 534, 541, 271 A.2d 105 (1970); *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, 168 Conn. 304, 305, 306, 362 A.2d 1375 (1975); *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, 17 Conn. App. 53, 56, 549 A.2d 1076 (1988). Where the Commission gives reasons for its action, the court does not go behind the official

collective statement of the Commission to find other reasons which might have influenced some or all of the members of the Commission to reach a final collective decision. *DeMaria v. Planninq & Zoning Commission of Enfield*, supra, 541. Where a special permit is denied, it is sufficient if any one of the reasons given supports the agency's action. *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 306. Where none of the assigned reasons are valid, the court can sustain the appeal and order the special permit granted, *DeMaria v. Planning & Zoning Commission of Enfield*, supra, 541, 542, at least where there is no other apparent problem of noncompliance with the zoning regulations.

When acting upon a special permit, a zoning commission acts in an administrative capacity. *Sheridan v. Planning Board of Stamford*, 159 Conn. 1, 16, 266 A.2d 396 (1970). The Commission should determine whether (1) the proposed use of the property is expressly permitted under the zoning regulations, *Weigel v. Planning & Zoning Commission of Westport*, 160 Conn. 239, 246, 278 A.2d 766 (1971), (2) whether the standards in the relevant zoning regulations are satisfied; *Farina v. Zoning Board of Appeals of Trumbull*, 157 Conn. 420, 422, 254 A.2d 492 (1969), and (3) whether conditions necessary to protect public health, safety, convenience and property values, as provided by Sec. 8-2 of the General Statutes, can be established. *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 307.

A church is allowed in a residential zone with a special permit, and the Commission did not find noncompliance with any specific standards in the zoning regulations. The Commission did not resolve conditions for

traffic control devices which would prevent traffic problems, although it discussed them, because a majority of the Commission thought the special permit should be denied for noncompliance with the general regulation concerning traffic conditions. There was a difference of opinion between the Commission members themselves, and between the parties to this appeal, as to the meaning and application of Sec. 118-21H(3).

If a special permit application conforms with the standards in the statutes and the agency's existing regulations, it must be approved. *A.P. & W. Holding Corporation v. Planning & Zoning Board of Milford*, 167 Conn. 182, 185, 355 A.2d 91 (1974); *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 56. The Commission cannot require the applicant to meet conditions not contained in the regulations themselves. *DeMaria v. Planning & Zoning Commission of Enfield*, supra, 540, 541; *Powers v. Common Council of Danbury*, 154 Conn. 156, 160, 222 A.2d 337 (1966). A special permit can only be denied for failure to meet specific standards in the regulations, and not for vague, general reasons. *DeMaria v. Planning & Zoning Commission of Enfield*, supra, 541. See also *Kosinski v. Lawlor*, 177 Conn. 420, 423, 418 A.2d 66 (1979).

On appeal, the court reviews the record before the agency and determines whether the reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations which the Commission is required to apply under the zoning regulations. *Holt-Lock, Inc. v. Zoning & Planning Commission of Granby*, 161 Conn. 182, 190, 286 A.2d 299 (1971); *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 168 Conn. at 306; *Spectrum of Connecticut, Inc. v. Planning &*

Zoning Commission of Ellington, 13 Conn. App. 159, 163, 535 A.2d 382 (1988). "The settled standard of review of questions of fact determined by a zoning authority is that a court may not substitute its judgment for that of the zoning authority as long as it reflects an honest judgment reasonably exercised." *Oakwood Development Corporation v. Zoning Board of Appeals of Torrington*, 20 Conn. App. 458, 460, 567 A.2d 1260 (1990). Facts supporting the agency's decision also include knowledge acquired by commission members through personal observation of the site, or through personal knowledge of the area involved in the application. Id., 460. Credibility of witnesses is also within the discretion of the Commission. *Spectrum of Connecticut, Inc. v. Planning & Zoning Commission of Ellington*, supra, 163. Despite deference to the agency on factual issues and findings, "a court cannot take the view in every case that the discretion exercised by the local zoning authority must not be disturbed, for if it did the right of appeal would be empty." *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 17 Conn. App. at 57, quoting from *Suffield Heights Corporation v. Town Planning Commission*, 144 Conn. 425, 428, 133 A.2d 612 (1957). Particularly close scrutiny is required here since the Commission's action indirectly implicates freedom of religion under the state and federal constitutions. The Commission's inability to reconcile the conflicting traffic reports and to agree on the proper interpretation of the regulation also requires some consideration of the credible evidence before the Commission on the issue of traffic.

2. Traffic conditions as affecting right to a special permit.

The zoning enabling statute, Sec. 8-2 of the General Statutes, provides in part that zoning regulations "shall be designed to lessen congestion in the streets." Accordingly, the consideration which applies to zoning applications is not the overall volume of traffic, but whether the increase in traffic will cause congestion. *Lathrop v. Planning & Zoning Commission of Trumbull*, 164 Conn. 215, 222, 319 A.2d 376 (1973). See also *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 17 Conn. App. at 69, 549 A.2d 1076 (1988). In addition, a land use agency cannot deny an application for a permitted use because of off-site traffic considerations. *TLC Development, Inc. v. Planning & Zoning Commission of Branford*, 215 Conn. 527, 532, 533, 577 A.2d 288 (1990) (site plan); *Sowin Associates v. Planning & Zoning Commission of South Windsor*, 23 Conn. App. 370, 374, 375, 580 A.2d 91 (1991) (subdivision). See also *Beit Havurah v. Zoning Board of Appeals of Norfolk*, 177 Conn. 440, 443, 418 A.2d 82 (1979), indicating that designation of property as a permitted use establishes a conclusive presumption that it does not adversely affect the district, which precludes further inquiry into the effect of development of the site upon traffic. Arguably, a different standard applies to special permits, since they are not permitted uses. They are uses which are allowed only under conditions specified in the zoning regulations. While this issue has not been settled under Connecticut law, and does not have to be resolved to decide this case, decisions from other states recognize that any development causes some increased traffic, and conclude that in order to deny a special permit because of

traffic, a project must cause traffic congestion and have a greater impact on the area than other permitted uses for the same property not requiring a special permit. *Miller v. Kiwanis Club of Lock Haven, Inc.*, 29 Md. App. 285, 347 A.2d 572 (1975); *Gowl v. Atlantic Richfield Co.*, 27 Md. App. 410, 341 A.2d 832 (1975); *Hobbs v. Albanese*, 417 NYS 2d 556, 70 App. Div. 1049 (1979); *Fantastic Plastic v. Zoning Board of Adjustment*, 332 A.2d 557 (Pa. 1975). See also *Cape Ann Land Development Corp. v. City Council of Gloucester*, 374 Mass. 825, 373 N.E.2d 218 (1978). Some of the permitted uses in the R-40 zone arguably have an equal or greater impact upon traffic than construction of a church.

The Commission did not expressly make a finding of traffic congestion, although it was bothered by the conflicting conclusions in the two 1990 traffic studies (Exhibits 18 and 19) and attempted to reconcile them. The conflicting opinions should not have been surprising, and is reminiscent of another case where the court noted:

> "Most of the oral testimony before the commission consisted of glowing statements by the proponents' attorneys on the advantages to the community of the project, while the attorneys for the opponents painted a gloomy picture of the effect upon the neighborhood if the gargantuan plans received approbation. Each side produced experts, or reports by experts, in the fields of traffic control and town planning. Their opinions favored the view of their employers."

Whalen v. Town Plan & Zoning Commission of Fairfield, 146 Conn. 321, 325, 326, 158 A.2d 312 (1959). While the zoning regulations do not require a traffic study to be submitted with a special permit application, the plaintiff retained a

traffic expert who prepared a report for both the 1988 and 1990 submissions. (Exhibits 18 and 23.) The opponents, mostly neighboring property owners, hired their own traffic expert who had the benefit of reviewing both of the proponents' reports, and used some of their data in critiquing them. (Exhibit 19.) While the opinions on the effect of additional traffic vary, the reports show basic agreement on road configuration, existing traffic volumes and accident statistics.

Access to the site is off Walnut Hill Road, a substantial distance from the intersection of Weed Road to the west and Old Hawleyville Road to the east. The sight distances from the proposed entrance on Walnut Hill Road is about 620 feet to the west and 450 feet to the east, well in excess of the minimum sight distance of 200 feet for a road with a posted speed limit of 25 miles per hour. If the church is built, the Sunday peak hour for traffic will be between 12:00 noon and 1:00 p.m. The present traffic volume in both directions on Walnut Hill Road for the peak hour is 69 vehicles. Vehicle traffic for Weed Road and Old Hawleyville Road at their intersections with Walnut Hill Road are 40 and 515 vehicles per hour respectively. With a projected attendance at church services of 508 persons, the site would generate 245 vehicle trips on Walnut Hill Road during the peak hour, with 15 vehicles entering and 230 vehicles leaving the property. The applicant's report projected that 220 of the 230 vehicles leaving the site, 220 would go easterly on Walnut Hill Road to the Old Hawleyville Road intersection. There is a stop sign on Walnut Hill Road at the Old Hawleyville Road intersection, but no traffic control device on Old Hawleyville Road. It was projected that 150 of the 220 vehicles would

make a left turn on Old Hawleyville Road and proceed to a traffic light at Newtown Road (Route 6). The other ten cars leaving the site would proceed westerly on Walnut Hill Road to the Weed Road intersection. There is no traffic control device on Walnut Hill Road but a stop sign on Weed Road. Both reports were in agreement that the present level of service in both directions on Walnut Hill Road is either level of service A or B and that the additional traffic from the church site which turned westerly on Walnut Hill Road to Weed Road would not significantly change those levels.

Levels of service are rated A through F by traffic engineers, and are used to describe traffic flow conditions. The capacity of a roadway or intersection is defined as "the maximum rate of vehicles which have a reasonable expectation of passing a given section of a lane or roadway during a given time period under prevailing roadway and traffic conditions." Prevailing conditions take into account physical operating conditions and traffic characteristics including roadway alignment, number and width of lanes, direction of traffic, traffic control devices and other factors. Vehicle capacity determines the ability of a Roadway or intersection to accommodate traffic under various levels of service. The levels of service are a measure of factors which influence the amount of traffic congestion, including speed and travel time, traffic interruption, safety and delays. Level of Service A is the best condition. Level of Service F is characterized by volumes greater than the roadway capacity as complete congestion occurs, and it is considered unacceptable traffic operations. Level of Service E is defined as the actual capacity of the roadway and involves delay to all

motorists due to congestion; it is considered to be the limit of acceptable delay, with delays of 40 to 60 seconds per vehicle. Service Level F involves delays of over 60 seconds. A level of service for unsignalized intersections is stated in terms of reserve or unused capacity of the approach lane in question, measured in additional vehicles per hour.

There was a significant difference of opinion on the level of service at the Walnut Hill Road intersection with Old Hawleyville Road resulting from an additional 220 vehicles during the peak hour. The applicant's report anticipated a service level between A and C while the opponents' report anticipated Level F because of cars making a left turn at the intersection onto Old Hawleyville Road. A related consideration was that there had been 30 accidents at the intersection in a five and one-half year period.

Walnut Hill Road is generally 20 to 21 feet in width, and there were only two accidents in five and one-half years at the Weed Road intersection with Walnut Hill Road. The applicant's traffic study did not address service levels at that intersection, although it should have been obvious to the Commission that with the small number of vehicles involved it would be Service Level A. The opponents' report argued that a higher percentage of cars leaving the site would proceed westerly on Walnut Hill Road to that intersection and then proceed northerly on Weed Road to Route 6. The report did not indicate whether going the opposite direction on Walnut Hill Road would improve the service level at the Old Hawleyville Road intersection. The opponents' report also

questioned adequacy of sight distances and width of the roadways near the site.

The minutes of the Commission's discussion of the conflicting traffic reports shows concern and confusion on its part on whether there was adequate compliance with the regulation. While there was some discussion about changes in traffic control devices at the Walnut Hill Road – Old Hawleyville Road intersection, the Commission was uncertain whether it could act because it did not have direct control over such changes. In fact, the Commission could have approved the special permit conditional upon a modification of traffic control devices at the intersection. *Lurie v. Planning & Zoning Commission of Westport*, 160 Conn. 295, 307, 278 A.2d 799 (1971) (conditional approval of a special permit was valid where applicant would pay for off-site improvements and initial approval was obtained from the State Highway Department).

The plaintiff claims that the general, vague standard relied upon by the Commission was inadequate to prevent approval of the special permit. The regulation requires the Commission to find that "no conditions will be created which will adversely affect traffic." Several concepts support the plaintiff's position. Zoning regulations, which are in derogation of common law property rights, should not be construed to include or exclude by implication matters that are not clearly within their expressed terms. *Planninq & Zoning Commission of Lebanon v. Gilbert*, 208 Conn. 696, 705, 546 A.2d 823 (1988). While the interpretation of a zoning regulation by a land use agency is entitled to some deference, the interpretation of provisions in the ordinance is a question of law for the

court. *Danseyar v. Zoning Board of Appeals of Middletown*, 164 Conn. 325, 327, 321 A.2d 474 (1973); *Thorne v. Zoning Board of Appeals of Stamford*, 156 Conn. 619, 620, 238 A.2d 400 (1968). The proper consideration for traffic in a zoning context is not whether the use increases traffic volume, but whether it causes a traffic hazard or traffic congestion. *Lathrop v. Planning Zoning Commission of Trumbull*, supra, 222. However, the regulation does not refer to traffic congestion and it is apparent from the discussion on the application (Exhibit 49) that the Commission was uncertain exactly what it had to consider to determine whether the project conformed with the regulation. Some Commission members had the impression that any change in the level of service, even short of Level F, violated the regulation. Other discussion focused on road and sight line distances at locations not near the site and on highways other than Walnut Hill Road. A municipality has a legal duty to maintain its highways in a reasonably safe condition for public travel, *Stamford Dock & Realty Corp. v. Stamford*, 124 Conn. 341, 344, 200 A. 346 (1938), and cannot deny access to a public highway on the excuse that it has not adequately maintained its roads.

3. General regulation as ground for denial of special permit.

Part of the Commission's problem in applying the regulation resulted from the vagueness of the regulation itself. Administrative regulations must have adequate, fixed and sufficient standards to guide the agency in their application to avoid decisions which allow the agency to interpret the regulations in more than one manner and

apply them arbitrarily. *Ghent v. Planning Commission of Waterbury*, 219 Conn. 511, 517, ___ A.2d ___ (1991); *Sonn v. Planning Commission of Bristol*, 172 Conn. 156, 162, 374 A.2d 159 (1976). A property owner cannot be required to offer sufficient proof as the agency may require to allow use of property where the agency's view is not guided by fixed standards. *Helbig v. Zoning Commission of Noank Fire District*, 185 Conn. 294, 310, 448 A.2d 940 (1981). What will "adversely affect" traffic is a vague and imprecise concept susceptible of several interpretations. The plaintiff claims that the only reasonable construction of the regulation is that the application cannot be denied based on it unless a specially permitted use generates traffic which will have a greater adverse impact than permitted uses in the zone, and the traffic generated by the site will endanger public safety. "The designation of a particular use of property as a permitted use establishes a conclusive presumption that such use does not adversely affect the district and precludes further inquiry into its effect on traffic, municipal services, property values, or the general harmony of the district." *Beit Havurah v. Zoning Board of Appeals of Norfolk*, supra, 177 Conn. at 443. Some of the permitted uses in a residential zone, such as a community recreation facility, public park and public playground, may generate as much concentrated traffic as a church and with the same potential effect. The effect of permitted uses upon adjacent roadways, while not controlling, provides some guidelines as to traffic volume and concentration required to adversely affect traffic in the vicinity of the site.

In the final analysis, despite the conflicting evidence and uncertainty as to the meaning of the regulation, the

Commission voted down the application by only a four to three vote. In addition, it had previously approved virtually the same application in 1988, although that approval was appealed and reversed on a procedural ground (Mark C. Hehl, et al. v. Bethel Planning & Zoning Commission, CV88-0295893S, appeal sustained for receipt of evidence after the public hearing).

4. Right of zoning authority to deny application which was previously approved.

There is a well established concept in the administrative law of this state which prohibits an administrative agency from reversing its prior decision unless the facts and circumstances which resulted in the decision have sufficiently changed to materially affect the reason which produced and supported the decision and no vested rights have intervened. *Laurel Beach Assn. v. Zoning Board of Appeals of Milford*, 166 Conn. 385, 387, 349 A.2d 834 (1974); *Hoffman v. Kelly*, 138 Conn. 614, 616-17, 88 A.2d 382 (1952); *St. Patrick's Church Corporation v. Daniels*, 113 Conn. 132, 139, 140, 154 A.343 (1931); *Root v. Zoning Board of Appeals of Madison*, 41 Conn. Sup. 218, 220-21, 565 A.2d 14 (1989); *Carlson v. Fisher*, 18 Conn. App. 488, 497, 558 A.2d 1029 (1989).

An administrative agency which has acted on a special permit application is not allowed to reverse itself unless a change of circumstances intervenes which materially affects the merits of the case, except that it can grant a second application which has been substantially changed to meet the objections the agency had to the original application. *Rocchi v. Zoning Board of Appeals of*

Glastonbury, 157 Conn. 106, 111, 248 A.2d 922 (1968); *Mitchell Land Co. v. Planning & Zoning Board of Appeals of Greenwich*, 140 Conn. 527, 534-35, 102 A.2d 316 (1953). The decisions on this concept have involved disapproval of an initial application and submission of a second one which is then approved, but it should also apply where an initial approval which is not implemented is then taken away on a second application.

There is no evidence of changed conditions from the time of the prior approval. While the opponents retained a traffic engineer to oppose the application, his report primarily relied upon the data of the proponent's traffic expert from both the 1988 and 1990 applications, even though the two experts reached different conclusions. For material changes to exist since the prior application, there should be some evidence of changed conditions in the immediate vicinity of the subject property connected with the reason for disapproval of the second application. See *Burr v. Rago*, 120 Conn. 287, 293, 180 A. 444 (1935). There is no evidence of changed traffic conditions in the area between July, 1988 and October, 1990 or any other land development activities which would significantly increase the traffic volume or cause traffic congestion on the roads near the project. In addition, while there may be some question or debate over traffic conditions, the commission did not clearly make a mistake by its July, 1988 approval of the project. The Town officials and agencies to which the applications were referred had no significant problems with either application. Absent factual findings by the Commission as to how the application was different from the previous one, it should not have

denied the special permit. See *Anastasi v. Zoning Commission of Bristol*, 163 Conn. 187, 189, 190, 302 A.2d 258 (1972). This is particularly true where the applicant was willing to consider reasonable controls and improvements to prevent traffic problems. While all of the considerations previously discussed show that the one reason assigned by the Commission for denying the application was inadequate and that it abused its discretion in denying the special permit, this case presents another critical factor which requires reversal of the decision and approval of the special permit.

5. Constitutional limitations on applying zoning regulations to churches.

The plaintiff contends in both this case and the declaratory judgment action that special standards apply here because the right to the free exercise of religion is involved, that the zoning regulations are unconstitutional and violate several provisions of the U.S. and Connecticut Constitutions. The right to raise such claims in a land use appeal is limited. As the defendant claims, Connecticut adheres to a rule that a party who makes an application under a zoning or other land use ordinance is precluded in the same proceeding from raising the question of its constitutionality. *Bierman v. Planning & Zoning Commission of Westport*, 185 Conn. 135, 139, 448 A.2d 882 (1981); *J & M Realty Co. v. Norwalk*, 156 Conn. 185, 191, 239 A.2d 534 (1968); *St. John's Roman Catholic Church Corporation v. Darien* , 149 Conn. 712, 717, 184 A.2d 42 (1962). Constitutional

questions can be raised in a separate declaratory judgment proceeding. *Bierman v. Planning & Zoning Commission of Westport*, supra, 185 Conn. at 140; *St. John's Roman Catholic Church Corporation v. Darien*, supra; *Cioffoletti v. Planning & Zoning Commission of Ridgefield*, 209 Conn. 544, 563, 552 A.2d 796 (1989). This prevents a broad constitutional attack on the Bethel Zoning Regulations in this appeal, even though churches are not a permitted use in any zone in the town. However, there is an exception to this rule which allows an unsuccessful applicant to raise constitutionality of a regulation in an administrative appeal as applied only to its own property under the facts of the case. *Bierman v. Planning & Zoning Commission of Westport*, supra, 185 Conn. at 140; *J & M Realty Co. v. Norwalk*, supra, 156 Conn. at 191 n.; *DeForest & Hochkiss Co. v. Planning & Zoning Commission of Madison*, 152 Conn. 262, 269, 205 A.2d 774 (1964).

Several cases in this state have considered the application of zoning regulations to churches. In *West Hartford Methodist Church v. Zoning Board of Appeals of West Hartford*, 143 Conn. 263, 121 A.2d 640 (1956), it was held that a zoning board of appeals did not abuse its discretion by denying a special exception for a church in a residential zone where the proposed location would adversely affect the area because of an increase in traffic which would cause a substantial loss in value of nearby residential properties. The court noted, 143 Conn. at 266, that the plaintiff had withdrawn its claim that the provision of the zoning regulations which forbids the use of property within certain zones unless a special exception was

obtained from the board was unconstitutional, and limited the decision to whether the church met the regulations. In *St. John's Roman Catholic Church Corporation v. Darien*, supra, 149 Conn. at 720, it was recognized that even though churches may not be completely excluded from residential zones, they can be subject to reasonable regulation as to their location without violating the constitutional guarantee of freedom of religion. This is the majority rule. See Anderson, *American Law of Zoning*, Sec. 12.22. While not deciding the question here, both cases recognized that even if they cannot be wholly excluded from a town, churches and church schools may be subject to reasonable zoning regulations and require a special permit. In a subsequent case, *Beit Havurah v. Zoning Board of Appeals of Norfolk*, supra, the court took a broad view as to the type of activities that are allowed as accessory uses to a church. More recently, in *Daughters of St. Paul, Inc. v. Zoning Board of Appeals of Trumbull*, supra, 17 Conn. App. at 53, the Appellate Court upheld the trial court's reversal of the denial of a special exception (special permit) for construction of a convent and religious book store. While not deciding the case on constitutional grounds, the opinion recognizes that the free exercise of religion clauses under Article One, Sec. 3 of the Connecticut Constitution and the First Amendment of the United States Constitution require more protection for churches than other uses of property, and that zoning regulations should not be strictly enforced against religious uses. *Daughters of St. Paul, Inc. v. Zoning Board of Appeals* supra, 17 Conn. App. at 67, 68. However, none of the Connecticut cases resolve

to what extent the state and federal constitutional provisions preclude or limit zoning regulations on churches and church activities.

Cases from other states have held that it is illegal for a municipality to exclude churches in all zones, from all residential zones, to allow them in the municipality only with a special permit, or have held that there was no compelling reason to deny a special permit. *Congregational Temple Israel v. City of Creve Coeur*, 320 S.W.2d 451, 456 (Mo. 1959) (exclusion from residential zones); *Englewood v. Apostolic Christian Church*, 146 Colo. 374, 362 P.2d 172 (1961) (church allowed only with special permit); *Islamic Center of Mississippi v. City of Starkville, Mississippi*, 840 F.2d 293 (5th Cir. 1988) (church allowed only with special permit in zone, even though permitted use in another residential zone); *Rogers v. Mayor & Aldermen of City of Atlanta*, 110 Ga. App. 114, 137 S.E.2d 668, 671 (1964) (church allowed only with special permit in residential zone); *Diocese of Rochester v. Planning Board of Town of Brighton*, 1 N.Y.2d 508, 136 N.E.2d 827, 834 (1956) (churches cannot be excluded from a residential district); *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, 139 Ohio St. 229, 39 N.E.2d 315 (1942) (church allowed in residential district only with special permit); *Congregation Committee, North Fort Worth Congregation of Jehovah's Witnesses v. City Council of Haltom City*, 287 S.W.2d 700 (Tex. Civ. App. 1956); *Mooney v. Orchard Lake*, 333 Mich. 389, 53 N.W. 2d 308 (1952); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 50 Wash. 2d 378, 312 P.2d 195 (1957) (special permit required for church in residential zone); *Church of Christ in Indianapolis v. Metropolitan Board of Zoning*

Appeals of Marion County, 175 Ind. App. 346, 371 N.E. 2d 1 331 (1978); *North Shore Unitarian Society v. Village of Plandome*, 200 Misc. 524, 109 N.Y.S. 2d 803 (1951); *Barhi v. Deal Borough Commissioners*, 204 N.J. Super. 575, 499 A.2d 559 (1985); *Jehovah's Witnesses Assembly Hall v. Woolwich Township*, 220 N.J. Super. 381, 532 A.2d 276 (1987). See also *82 Am. Jur. 2d Zoning and Planning*, Sec. 154; *Anderson American Law of Zoning*, 3d Ed., Sec. 12.22; *Love Church v. City of Evanston*, 671 F. Supp. 515 (N.D. Ill., 1987), reversed on other grounds, 896 F.2d 1082 (7th Cir. 1990); Annotation, 74 A.L.R. 2d 377.

These cases are based on the concept that such zoning restrictions must yield to the right of freedom of religion protected by the First and Fourteenth Amendments to the U.S. Constitution and comparable provisions in state constitutions where the zoning regulations unreasonably hinder or restrict religious activities. Constitutional provisions do not prevent all governmental regulation of churches and religious organizations, and they may be subject to religiously neutral regulation for a secular governmental purpose under the police power, such as, fire inspection, building and zoning regulations. *St. John's Roman Catholic Church Corporation v. Darien*, supra, 149 Conn. at 720, 723; *Wisconsin v. Yoder*, 406 U.S. 205, 214, 92 S. Ct. 1526, 1532, 32 L. Ed. 2d 15 (1972); *Lemon v. Kurtzman*, 403 U.S. 602, 612-14, 91 S. Ct. 2105, 2111-12, 29 L. Ed. 2d 745 (1971); *Islamic Center of Mississippi v. City of Starkville, Mississippi*, supra, 299; *Church of Christ in Indianapolis v. Metropolitan Board of Zoning Appeals of Marion County*, supra, 371 N.E.2d at 1334. The First Amendment limits the enactment of any law "respecting an establishment of religion, or prohibiting the free exercise

thereof." Article First, Sec. 3 of the Connecticut Constitution has a comparable provision. Article First, Sec. 20 guarantees equal protection of the laws and provides that no person shall be discriminated against in the exercise of his or her rights because of religion. The effect of these provisions on the plaintiff's property and to what extent they override zoning regulations based upon the police power, is beyond the scope of and unnecessary to decide this appeal.

Article Seventh of the Connecticut Constitution does have a provision which more specifically bears on the issue involved here, the right to build a church building on property owned by a church or ecclesiastical society. Article Seventh provides in part that any religious society "may build and repair houses for public worship." Provisions of our state constitution may be construed to provide greater protection of rights than the United States Constitution gives. *Husti v. Zuckerman Property Enterprises, Ltd.*, 199 Conn. 575, 589, 508 A.2d 735 (1986). The provision in Article Seventh, giving religious societies the right to build churches, has not been construed in our cases including, *St. John's Roman Catholic Church Corporation v. Darien*, supra, 149 Conn. at 720, where it was indicated that churches and church schools may be subject to reasonable regulations through zoning regarding their location without violating the constitutional guarantee of freedom of religion. Since this is an administrative appeal, it is not the proper action to decide whether Article Seventh creates a paramount right of a church society to build a church building without regard to

reasonable restrictions in the municipality's zoning regulations or significant traffic safety and congestion problems caused by its construction. Moreover, the plaintiff has conceded that the constitutional provisions protecting freedom of religion do not give a church the absolute right of a religious organization to construct a church building wherever it wants and in disregard of reasonable land use regulations based on the police power.

Our Supreme Court in *Burns v. Barrett*, 212 Conn. 176, 187, 561 A.2d 1378 (1989), quoting *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S. Ct. 762, 85 L. Ed. 104 (1941), stated that a restriction on use of highways to promote the public interest of everyone is not prevented by the attempted exercise of first amendment rights which in other circumstances would be entitled to protection. See also *Husti v. Zuckerman Property Enterprises, Ltd.*, supra; *Cologne v. Westfarms Associates*, 192 Conn. 48, 469 A.2d 1201 (1984). However, some increased traffic from construction of a church is not a sufficiently significant factor to warrant limitation of freedom of religion by denial of a special permit. *Family Christian Fellowship v. County of Winnebago*, 151 Ill. App. 616, 503 N.E. 2d 367 (1987); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, supra, 312 P.2d at 199; *Congregation v. City Council of Haltom City*, supra, 705; 82 Am. Jur. 2d 639, 640, *Zoning and Planning*, Sec. 154. In short, where there is a conflict between constitutional rights and land use regulations under the police power, the outcome depends upon the facts of each case. This type of problem frequently arises when land use regulations as applied to a specific property amount to an unconstitutional taking of it under the state and federal constitutions. See *Bartlett v.*

Zoning Commission of Old Lyme, 161 Conn. 24, 31, 282 A.2d 907 (1971). "[A] litigant may challenge the validity of a statute or ordinance under the Connecticut constitution only as it has been applied to him." *Husti v. Zuckerman Property Enterprises, Ltd.*, supra, 199 Conn. at 589. Under the facts of this case, the plaintiff church was entitled to a special permit on nonconstitutional grounds. However, even if those factors were insufficient to overturn the Commission's denial of the special permit, under the facts of this case and considering the specific and apparently unique language of Article Seventh of the Connecticut Constitution, denial of the special permit to build the church here would be illegal, and the provision in the zoning regulations would be unconstitutional as applied to the plaintiff's property.

6. Conclusion

Even though the Commission must grant a special permit to the church, it has the right to attach reasonable conditions necessary to protect the public health, safety, convenience and property values, as provided by Sec. 8-2 of the General Statutes. *Summ v. Zoning Commission of Ridgefield*, 150 Conn. 79, 91; 186 A.2d 160 (1962); *Housatonic Terminal Corporation v. Planning & Zoning Board of Milford*, supra, 168 Conn. at 307. The Commission's authority to impose reasonable conditions is not a standard allowing it to tack on any condition it wants, but merely the conditions allowed by the statute and the regulations. Reasonable and necessary conditions within the control of the applicant to alleviate traffic congestion in the vicinity of the site can be attached to a special

permit. *Lurie v. Planning and Zoning Commission of Westport,* supra, 160 Conn. at 299, 307; Sec. 118-21I of the Bethel Zoning Regulations.

The appeal is sustained and remanded to the Commission for proceedings consistent with this decision. Section 8-8(1) of the Connecticut General Statutes.

/s/ Robert A. Fuller
Robert A. Fuller, Judge